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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

Arizona Corporation Commission

DOCKETED

JUN 21 2005

DOCKETED BY



GRAHAM COUNTY UTILITIES, INC.,

Complainant,

VS.

ASHCREEK WATER COMPANY,

Respondent

DOCKET NO. W-02494A-01-0671

DECISION NO. 67951

OPINION AND ORDER

DATE OF HEARING:

November 21, 2002

PROCEDURAL CONFERENCES:

January 17, 2002; August 1, 2002; October 10, 2002; September 30, 2004; March 7, 2005

PLACE OF HEARING:

Tucson, Arizona

PRESIDING OFFICER:

Jane L. Rodda

APPEARANCES:

Mr. Leven B. Ferrin, Attorney at Law, on behalf of Graham County Utilities, Inc.;

Mr. Bevan Barney, Interim Manager, on behalf of Ashcreek Water Company;

Mr. David Smith, on behalf of Ashcreek Water Company, LLC;

Mr. William Clay Smith, on behalf of West Central Community Services; and

Ms. Lisa Vandenberg, Mr. Jason Gellman, Staff Attorneys, Legal Division, on behalf of Utilities Division.

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AZ Corporation Commission
Director Of Utilities

BY THE COMMISSION:

On August 30, 2001, Graham County Utilities, Inc. ("GCU"), a member-owned cooperative and a public service corporation, that provides *inter alia*, water utility service in Graham County, Arizona, filed with the Arizona Corporation Commission ("Commission"), a formal complaint

1 against Ashcreek Water Company ("Ashcreek"). Ashcreek is a public service corporation
2 certificated to provide water utility service in an area of Graham County near Pima, Arizona.
3 Ashcreek and GCU have adjacent service territories. In its Complaint, GCU alleged that without
4 GCU's permission Ashcreek extended water lines to serve 18 customers located in GCU's
5 certificated area. GCU further alleged that the facilities Ashcreek installed do not meet GCU's
6 specifications or the minimum requirements of the Arizona Department of Environmental Quality
7 ("ADEQ"). GCU requested that Ashcreek be ordered to cease and desist from providing water to
8 new customers, and that Ashcreek refund to the customers located in GCU's territory all monies
9 advanced to extend the facilities to their properties.

10 Subsequent to the hearing on the Complaint that was held in November 2002, Ashcreek came
11 under new management. With the new manager in place Ashcreek and GCU were able to reach
12 agreement on a Borderline Agreement that would resolve the Complaint. Commission Utilities
13 Division Staff ("Staff") and all interested parties have had an opportunity to review and comment on
14 the proposed Borderline Agreement. No party objects to the proposed Agreement. This Order
15 approves the proposed Borderline Agreement between Ashcreek and GCU subject to several
16 revisions as recommended by Staff, and conditioned upon Ashcreek providing water utility service in
17 conformance with all applicable laws, rules and regulations, and requiring Ashcreek to serve the area
18 pursuant to its approved rates and charges until further order of the Commission.

19 Procedural History

20 GCU filed its Complaint on August 12, 2001. On December 12, 2001, the Hearing Division
21 issued a Procedural Order that set a pre-hearing conference for January 17, 2002 in Tucson, Arizona,
22 and ordered Ashcreek to file an Answer to the Complaint no later than December 31, 2001.

23 Ashcreek is owned by several members of the Smith family. David Smith, representing
24 Ashcreek, prepared a letter dated January 2, 2002, which gives a history of the dispute. Although not
25 drafted as an Answer, the letter appears to have been drafted in response to the December 12, 2001,
26 Procedural Order.

27 A pre-hearing conference convened on January 17, 2002, in Tucson, Arizona. GCU appeared
28 telephonically through its General Manager, Steve Lines. Ashcreek appeared through its counsel,

1 David Kennedy. At the pre-hearing conference, the Administrative Law Judge asked the parties if
2 they had had an opportunity to talk with Commission Staff to see if a negotiated settlement was
3 possible. Mr. Kennedy, on behalf of Ashcreek, suggested that the parties attempt negotiations and
4 report back to the Commission in a couple weeks. GCU agreed to the proposal. The parties agreed a
5 hearing should be set to commence 45 to 60 days from the date of the procedural conference. GCU
6 requested in the interim, before the matter goes to hearing or the parties reach settlement, that the
7 Commission order Ask Creek to refrain from connecting any new customers in the disputed area.
8 Mr. Kennedy agreed, on behalf of Ashcreek, that it would not connect additional customers until the
9 matter goes to hearing or a settlement is reached. Mr. Kennedy stated that another member of the
10 Smith family, Mr. William Clay Smith, had been involved in effecting connections in the disputed
11 area. Mr. Kennedy avowed that Ashcreek would inform the Commission if William Clay Smith
12 made efforts to connect additional customers in the affected area.

13 By Procedural Order dated January 18, 2002, the Administrative Law Judge set the matter for
14 hearing on March 28, 2002, in Tucson, Arizona, and ordered the parties to file a witness list by
15 March 18, 2002. The January 18, 2002, Procedural Order further ordered Ashcreek not to connect
16 any new users within the disputed service territory.

17 On March 25, 2002, Ashcreek notified the Commission that an indispensable party had not
18 been made a party to the proceeding. Ashcreek requested a continuance of the March 28, 2002,
19 hearing date to give it time to file a third party complaint against William Clay Smith. GCU agreed
20 to the continuance.

21 By Procedural Order dated March 25, 2002, the Administrative Law Judge continued the
22 hearing indefinitely.

23 As of July 22, 2002, Ashcreek had not filed a third-party complaint, nor had the parties been
24 able to negotiate a settlement. In addition, GCU reported that it had reason to believe Ashcreek had
25 recently connected a new user in the disputed area. The Administrative Law Judge issued a
26 Procedural Order which set a procedural conference for August 1, 2002 and reiterated that Ashcreek
27 was not to connect any new customers in the disputed area until the resolution of the Complaint.

28 On July 25, 2002, Ashcreek filed a Motion for Order to Join Indispensable Party and Leave to

1 File Third Party Complaint, as well as an Answer and Third Party Complaint. In its Motion and
2 Answer, Ashcreek admitted that it serves seven customers in the area allegedly certificated to GCU,
3 and that such customers were extended service pursuant to a "borderline agreement" and authority
4 granted by GCU's predecessor in interest and with the knowledge of the Commission. Ashcreek
5 denied that it installed the mains complained about in CGU's second allegation, and asserted that
6 such installation was performed by William Clay Smith dba West Central Community Services
7 ("WCCS"). Ashcreek admitted that it provides water service to WCCS through a 2 inch meter for the
8 purpose of distribution to users located within GCU's alleged service area. Ashcreek asserted that
9 the relief GCU sought could not, and should not, be rendered by the Commission without asserting
10 jurisdiction over William Clay Smith.

11 On August 1, 2002, a pre-hearing conference convened. GCU, Ashcreek and Staff appeared
12 through their respective counsel. Staff recommended that the parties participate in a Staff-facilitated
13 mediation to determine if a resolution could be reached without going to a formal hearing.
14 Ashcreek's counsel agreed that mediation would be helpful to resolve the dispute concerning the
15 connections being served directly by Ashcreek, but believed that without William Clay Smith being
16 involved, a complete resolution would not be possible.

17 By Procedural Order issued August 8, 2002, the Administrative Law Judge granted
18 Ashcreek's Motion to Join an Indispensable Third Party, and ordered Ashcreek to effect personal
19 service on William Clay Smith. The Procedural Order ordered the parties to contact Staff to arrange
20 for mediation, and set another pre-hearing conference for October 10, 2002.

21 On October 9, 2002, the Commission received a letter from David Smith relating the events of
22 a meeting on October 3, 2002 between GCU, Ashcreek and William Clay Smith. The letter appeared
23 to question whether GCU is certificated to provide water service in the disputed area. The letter
24 suggested that at their October 3, 2002, meeting the parties agreed that when it is determined that
25 GCU has a certificate for the area and when it has facilities in the area, West Central Community
26 Services will turn over its lines and GCU can begin to collect fees for water service, and that in the
27 interim Ashcreek will be allowed to continue to provide service in the area. The letter further
28 suggested that Ashcreek will continue to provide service indefinitely to the customers on the border

1 of the franchise.

2 Pursuant to the August 8, 2002 Procedural Order, a pre-hearing conference convened on
3 October 10, 2002. GCU was represented by counsel, but Ashcreek had relieved Mr. Kennedy of all
4 responsibilities as counsel, and was represented by David Smith, a partner in the utility. William
5 Clay Smith also appeared, as did Staff, appearing through counsel.

6 Contrary to the implications of the letter from David Smith, GCU stated that although the
7 parties met on October 3, 2002, they were unable to reach agreement. Staff reported that the parties
8 had not arranged for mediation with Staff. Moreover, Ashcreek had not attempted to serve the Third
9 Party Complaint on William Clay Smith. Ashcreek apparently believed that since William Clay
10 Smith voluntarily agreed to appear, that it was not necessary to serve the Third Party Complaint.

11 Mr. William Clay Smith denied that he was acting as a public service corporation by
12 providing water purchased from Ashcreek to users in the disputed area which is known as White
13 Fence Farms. He also denied owning any assets and claimed that the users themselves owned the
14 facilities used to deliver the water. William Clay Smith characterized his role as a "coordinator."

15 By Procedural Order dated October 11, 2002, the matter was set for hearing on November 21,
16 2002, at the Commission's offices in Tucson, Arizona. Again, Ashcreek and West Central
17 Community Service were ordered not to provide service to, or take deposits from, additional users in
18 the disputed area.

19 The hearing convened on November 21, 2002, as scheduled. GCU appeared through counsel.
20 David Smith represented Ashcreek, and William Clay Smith participated. Witnesses testifying
21 included Steve Lines, GCU's General Manager; Jason Hughes, GCU's Operations Manager, Russ
22 Barney GCU's Chief Financial Officer; David Smith one of the partners of Ashcreek, and William
23 Clay Smith. Because this is a Complaint brought by one public service corporation against another,
24 Staff did not participate in the hearing.

25 The Hearing

26 The area in dispute is known as White Fence Farms ("WFF"), which is located just south of
27 Pima, Arizona. Melanie Street is the southern boundary of the WFF area and is also the demarcation
28 point between GCU's and Ashcreek's certificated areas. Ashcreek's certificated territory is located

1 south of Melanie Street, and GCU's is north of Melanie Street. Maps provided by the Commission
2 show that the White Fence Farms area is located within GCU's service territory.

3 At the hearing, GCU provided evidence that Ashcreek, or a party associated with Ashcreek,
4 extended main and distribution lines north of Melanie Street and is actively serving 19 customers.
5 GCU also believed that there were a number of inactive lots that had paid a deposit or advance in aid
6 of construction to be served water by Ashcreek. GCU identified ten lots that have lines run to them,
7 but do not currently have meters and were not receiving service.

8 Mr. Lines, GCU's general manager, testified that GCU has not been able to locate any record
9 of an agreement between Ashcreek and GCU's predecessor¹ that allows Ashcreek to provide service
10 in the White Fence Farms area. GCU searched its records and interviewed former employees to
11 determine if they could remember a verbal agreement that would allow Ashcreek to serve users north
12 of Melanie Street.

13 Jason Hughes, Operations Manager of GCU's water and gas division, testified and offered
14 pictures which indicated that the lines serving the users in the White Fence Farm are not buried to a
15 sufficient depth to conform to ADEQ regulations. In addition, Mr. Hughes testified that the 4 inch
16 main that extends along Clay Street is not large enough for the distance it traverses pursuant to
17 ADEQ Engineering Bulletin No. 10. GCU stated that it did not know anything about the quality of
18 the lines and is concerned that when it is able to extend lines into the area, it will not be able to use
19 the existing facilities because they will not be up to code.

20 GCU has facilities located approximately 5,000 feet away in a subdivision known as Tidy
21 Acres. GCU states that it has never refused service from anyone in the White Fence Farms area, but
22 estimated that it would cost \$50,000 to extend a line to the White Fence Farms area, and an additional
23 \$50,000 to install lines to serve the entire White Fence Farms area. GCU believes that the \$100,000
24 cost is too great for the Cooperative to absorb.

25 GCU requested that Ashcreek, and all persons associated with it, such as WCCS, refrain from
26 connecting any new water service meters in GCU's certificated area. GCU did not request that

27 ¹ GCU acquired the stock of General Utilities, Inc. and City Utilities Company from the Fredrickson family in 1989.
28 General Utilities provided gas service and City Utilities provided water service to areas of Graham and Greenlee
Counties.

1 Ashcreek stop serving customers who are currently receiving service, but wanted to reserve its right
2 to serve these customers when it extends its lines into the area. GCU requested that lot owners who
3 have made deposits or contributions in aid of construction to Ashcreek or WCCS be refunded those
4 amounts. Finally, GCU requested that Ashcreek pay a franchise fee of \$5.00 per month per active
5 water meter north of Melanie Street.

6 Ashcreek questioned whether the WFF area was within GCU's certificated area, however, it
7 did not offer any evidence to contradict the accuracy of Commission maps. Further, there is no
8 dispute that either Ashcreek directly, or WCCS, by means of a hook-up with Ashcreek, is serving the
9 WFF area.

10 Ashcreek admitted that it provides service directly to several lots along Melanie Street. David
11 Smith testified that he believed there was a verbal agreement between the Frederickson family, who
12 owned General Utilities,² and Ashcreek that permitted Ashcreek to serve at least some of the lots
13 along the north side of Melanie Street.

14 Ashcreek also admitted that it provides service to WCCS via three meters which are located
15 along Melanie Street. David Smith testified that when Ashcreek agreed to provide water to WCCS,
16 as a partner of Ashcreek, he knew that WCCS would in turn be providing water to individual users.
17 David Smith was the partner who authorized the 2 inch meter that connects to the line that runs down
18 Clay Street. Indeed, David Smith financed the construction of the 4 inch line that serves the north
19 portion of White Fence Farms, although he denies being the owner of the assets. Various members of
20 the Smith family own, or have owned, lots in the White Fence Farms area. (November 21, 2002
21 trans. at 102 – 104)

22 David Smith testified to a belief that WCCS could hook into the Ashcreek system at WCCS's
23 own expense, and that as long as WCCS's meters were located along Ashcreek's certificated area,
24 Ashcreek could provide service to WCCS as an unregulated water user. (November 21, 2002
25 transcript at 68-69, 70, 76 and 93-94, 97). Because the residents of White Fence Farms could not
26 obtain water from GCU, Mr. Smith did not understand why they could not provide their own water.

27 ² Throughout the proceeding, the parties referred to GCU's predecessor-in-interest as General Utilities. Commission
28 records indicate that for water service, the predecessor was City Utilities. The Commission approved GCU's acquisition
of both entities in Decision No. 56660 (October 25, 1989).

1 Both David and William Clay Smith stated that the WCCS assets were collectively owned by the
2 WFF users. David Smith testified that he was not aware of the users complaining about the service
3 they receive.

4 David Smith argued that the \$5 per meter per month suggested by GCU as compensation was
5 unfair. He did not believe that Ashcreek was making that much profit on each meter per month. He
6 suggested that Ashcreek give the entire White Fence Farm system to GCU and GCU could purchase
7 water from Ashcreek to serve the area itself.

8 The evidence supports a finding that both Ashcreek and WCCS have been providing water
9 service within the certificated service territory of GCU without permission. There is no reliable
10 evidence of an agreement, oral or otherwise, between Ashcreek and GCU's predecessor in interest
11 that would allow Ashcreek to serve the lots located north of Melanie Street. Neither is there an
12 agreement between WCCS and GCU that would allow WCCS to serve WFF. Throughout this
13 proceeding, there seemed to be confusion on the part of the Smiths in believing that as long as the
14 WCCS meters were adjacent to Ashcreek and did not serve more than 15 users, it was not subject to
15 Commission regulation. It also appears that wanting to sell lots in the White Fence Farms area
16 motivated the scheme to provide water.

17 Although GCU demonstrated that both Ashcreek and WCCS have been providing water
18 service within GCU's certificated area, GCU did not provide sufficient evidence at the hearing to
19 allow a determination that its suggested compensation of \$5.00 per meter per month was fair and
20 reasonable.

21 Events Subsequent to the Hearing

22 On August 13, 2003, the Commission issued Decision No. 66180 which appointed Mr. Bevan
23 Barney to act as interim manager of Ashcreek.

24 On August 11, 2004, Mr. Bevan Barney filed an Emergency Motion seeking guidance with
25 respect to serving customers in the White Fence Farms area and indicating that Ashcreek and GCU
26 were able to agree in principal to a borderline agreement that would consensually resolve the
27 Complaint.

28 Because the issues raised in the Complaint and the Borderline Agreement affects the health

1 and safety of residents living in the White Fence Farm area, by Procedural Order dated August 27,
2 2004, Staff was ordered to investigate the facts surrounding the provision of service in the White
3 Fence Farms area. Pursuant to the August 27, 2004 Procedural Order, Staff filed a Staff Report on
4 September 27, 2004.

5 In its September 27, 2004 Staff Report, Staff confirmed many of the facts that had come out
6 during the hearing. Further, Staff's investigation noted that Ashcreek is not authorized to bill and
7 collect for the White Fence Farm area, can not turn off meters for nonpayment, and that there was a
8 mainline leak in WFF that Mr. Bevan Barney was unable to repair as the lines are outside Ashcreek's
9 service area. Staff found that GCU and Ashcreek were willing to enter into a borderline agreement
10 that would resolve the problems of providing water service to WFF. Staff agreed with GCU and
11 Ashcreek that a borderline agreement that would allow Ashcreek to collect for water use directly
12 from WFF customers would be the best arrangement.

13 A Procedural Conference concerning the Emergency Motion convened on September 30,
14 2004. Present at the September 30, 2004 Procedural Conference, either in person or telephonically,
15 were Mr. Bevan Barney, Mr. David Smith. Mr. William Clay Smith, Mr. Russ Barney representing
16 GCU, and Commission Utilities Division Staff appearing through counsel. During the Procedural
17 Conference Mr. Bevan Barney, as interim manager of Ashcreek, and GCU outlined the terms of a
18 proposed, negotiated Borderline Agreement that would resolve the issues raised in the Complaint.
19 Staff and all parties present at the September 30, 2004 Procedural Conference agreed that a
20 Borderline Agreement was the best resolution of the Complaint and would best serve the needs of
21 customers in the White Fence Farms area.

22 At the September 30, 2004 Procedural Conference, Mr. David Smith stated that he had no
23 objection to Ashcreek serving the WFF area directly. (September 30, 2004 Trans. at 12) David Smith
24 stated that at least immediately, Ash Creek could serve WFF using facilities that were installed by
25 either WCCS or Mr. Smith. (Id. at 20) Mr. Smith also gave Mr. Bevan Barney permission to repair
26 the mainline leak in the WFF area. (Id. at 28)

27 By Procedural Order dated October 19, 2004, the Hearing Division ordered Ashcreek and
28 GCU to file a Borderline Agreement for review and approval by the Commission. The October 19,

1 2004, Procedural Order also ordered interested parties to file comments and/or recommendations
2 concerning the proposed Borderline Agreement within ten days of its filing date.

3 On October 8, 2004, in response to a request by the Administrative Law Judge, Staff filed a
4 Memorandum concerning the rates to be charged in the White Fence Farm area if Ashcreek is to
5 serve the area pursuant to a Borderline Agreement. Staff indicated that such determinations are made
6 on a case-by-case basis, that Staff has not been able to form an opinion on the appropriate rate
7 treatment. Once it has reviewed the specific agreement, Staff stated it would be in a better position to
8 help resolve remaining issues.

9 Ashcreek and GCU filed their proposed Borderline Agreement on November 22, 2004. A
10 copy of the proposed Borderline Agreement is attached hereto as Exhibit A, and incorporated herein
11 by reference.

12 As of January 6, 2005, neither Staff nor any party, had filed comments to the Borderline
13 Agreement pursuant to the October 19, 2004, Procedural Order. By Procedural Order dated January
14 6, 2005, the time for parties to file comments to the Borderline Agreement was extended until
15 January 27, 2005. Staff was ordered to file its recommendations on whether the November 22, 2004,
16 Borderline Agreement is in the public interest and whether in Staff's opinion there are additional
17 issues that need to be resolved. The January 6, 2005, Procedural Order notified parties that unless a
18 hearing was requested, the Commission could approve the Borderline Agreement without a hearing.
19 Parties were given ten business days after Staff filed its Staff Report on the Borderline Agreement to
20 file any comments on the Staff Report.

21 On January 27, 2005, Ashcreek filed a pleading entitled "Additional Issues." Ashcreek noted
22 that customers in the White Fence Farms area have claimed to have paid contributions ranging from
23 \$300 to \$2,000, but that Ashcreek has no record as to the amounts or when such alleged contributions
24 were made. Ashcreek sought guidance on how to value the assets associated with the contributions
25 and whether such contributions should be treated as contributions or advances.

26 On January 27, 2005, Mr. David Smith filed comments entitled "Response of Respondent."
27 Mr. David Smith states:

28 Whereas, David M. Smith, provided means whereby the White

1 Fence Farms Area could receive potable water service and whereas
2 the customers living in the White Fence Farms Area paid to the
3 Respondent to have water service provided by the Ashcreek Water
4 Company to him or his representatives. It would be considerate of
5 Staff to allow the same amounts as the previous customers have
6 done. This would be only until the Respondent recoups the initial
7 costs.

8 Mr. Smith also appears to complain that the grant of the GCU including the area of the White Fence
9 Farms was not properly noticed to Ashcreek at the time of its initial grant.

10 On February 15, 2005, Staff filed its Staff Report on the proposed November 22, 2004,
11 Borderline Agreement. On February 18, 2005, Staff filed an Amended Staff Report. Staff
12 recommended approval of the Borderline Agreement with certain minor revisions.

13 By Procedural Order dated February 23, 2005, a Procedural Conference for the purpose of
14 discussing and clarifying the various comments and recommendations was set for March 7, 2005.
15 The parties were given until March 3, 2005 to file any comments to the February 18, 2005 Staff
16 Report.

17 The Borderline Agreement

18 The Borderline Agreement as executed by Ashcreek and GCU provides that for an annual fee
19 of \$10.00 Ashcreek will be permitted to provide water service to customers within the WFF area.
20 The agreement provides that Ashcreek will assume the infrastructure of WCCS "with the consent of
21 the Arizona Corporation Commission, Utilities Division" and use such infrastructure to serve
22 customers in the WFF area. If GCU eventually extends lines to serve WFF, the installed
23 infrastructure that meets current state standards will be sold to GCU at the depreciated value.
24 Ashcreek will bill customers in the WFF area at Ashcreek's approved tariff rates. The agreement
25 renews annually unless canceled by either party.

26 The February 18, 2005, Staff Report indicates that Staff found the proposed Borderline
27 Agreement to be generally acceptable, but made several recommendations. First, Staff did not
28 believe that the language "with the consent of the Arizona Corporation Commission" is necessary to
the agreement because as indicated in the October 21, 2004 Procedural Order, Commission approval
of the Borderline Agreement is already required. Second, Staff expressed concern that the provision
that GCU would incur "no liability" in the WFF area is overly broad. Third, Staff noted that the

1 Borderline Agreement did not address notification to the WFF customers. Finally, Staff recommends
2 that the Agreement affirm that Ashcreek will provide water that complies with all laws and regulatory
3 standards to WFF customers.

4 At the March 7, 2005 Procedural Conference, GCU and Ashcreek agreed that the Borderline
5 Agreement could be modified to eliminate the language “with the consent of the Arizona Corporation
6 Commission, Utilities Division”. (March 7, 2005 trans. at 5)

7 GCU indicated that the intent behind the “no liability” language in Section 2 of the Borderline
8 Agreement was to acknowledge that if Ashcreek fails to serve the area, GCU would not be obligated
9 to provide service even though it is within GCU’s service territory. (March 7, 2005 trans. at 8) As a
10 result, Staff suggested the Borderline Agreement should be clarified to provide that GCU will incur
11 no liability or obligation to provide water service. (Id. at 8)

12 At the March 7, 2005 Procedural Conference, Mr. Bevan Barney indicated that following the
13 September 2004, Procedural Conference he provided notice to the WFF customers that Ashcreek
14 would be providing service. Following the Procedural Conference, he sent copies of the notices to
15 the Commission. The notice informed WFF customers that Ashcreek would be billing them for water
16 use, that the first bill would cover six weeks usage, and thereafter they would be receiving bills on a
17 monthly basis. Mr. Barney indicated that he has contacted most of the WFF customers personally,
18 and that he sends updates of his activities with every bill so that customers are fully informed of this
19 and other Commission proceedings (March 7, 2005 trans at 11-12).

20 Analysis and Resolution

21 There is a demonstrated need for water service in the WFF area, but GCU cannot provide
22 service to the WFF area without a large investment which does not appear to be feasible at this time.
23 Ashcreek appears best placed to serve the WFF area at this time. The negotiated Borderline
24 Agreement, as modified by Staff’s recommendations, is a fair and reasonable resolution of the
25 Complaint, is in the public interest, and should be approved. In addition to the modifications
26 discussed above, we approve the Borderline Agreement on the express condition that Ashcreek
27 provide water service to the WFF area in compliance with all applicable laws and regulations. In
28 addition, the Borderline Agreement addresses the parties’ ability to terminate the agreement, but does

1 not address the event if Ashcreek wants to terminate the agreement before GCU is willing or able to
2 serve the WFF area. Consequently, we approve the Borderline Agreement on the condition that
3 Ashcreek must continue to provide water service to WFF under its approved rates and charges until
4 further order of the Commission.

5 The infrastructure to serve the WFF area was initially installed by WCCS or David Smith,
6 neither entity, a signatory to the Borderline Agreement. David Smith has made statements that he
7 consents to Ashcreek's use of the infrastructure, but he has also raised an issue in his January 2005
8 comments that perhaps he is seeking reimbursement for his costs of installation.³ Based on past
9 statements we believe David Smith is in favor of the Borderline Agreement. In any case, as a partner
10 of Ashcreek he would be bound by the terms of the Borderline Agreement. The issues of how to
11 value the WCCS infrastructure and what to do about any funds paid by WFF users to hook up to the
12 system are beyond the scope of the Complaint and remain to be resolved. Any such advances were
13 not made to Ashcreek, but rather to WCCS or David Smith acting independently of his position with
14 Ashcreek.

15 Testimony is confused and contradictory concerning how independently of Ashcreek WCCS
16 has acted. It appears that although Ashcreek billed West Central Community Service for the water
17 purchased through its three meters, there may be some lots within the White Fence Farms Area that
18 Ashcreek billed directly (November 21, 2002 trans. at 74). William Clay Smith testified that WCCS
19 charges the same rates as Ashcreek, namely a \$20.00 minimum monthly charge and \$1.95 per 1,000
20 gallons. (November 21, 2002 trans. at 129) However, he also testified that they would divide the bill
21 from Ashcreek and collect proportionately from the users (November 21, 2002 trans. at 135-136). At
22 one time, Ashcreek was billing the users directly. (November 21, 2002 trans. at 128) When there is a
23 leak, or other problem with the White Fence Farm system, users called Ashcreek. David Smith
24 testified that he believed that as long as the meter was placed at Ashcreek's boundary, Ashcreek
25 legally could provide water service to any lot in the White Fence Farms area (November 21, 2002
26 trans. at 97). The question of which entity is actually providing service to WFF is complicated by
27

28 ³ Mr. David Smith received notice but did not appear at the March 7, 2005 Procedural Conference to clarify his statements.

the fact that at the time in question David Smith was participating in the management of Ashcreek, but also acting independently as the financier of the WFF infrastructure.

As part of this proceeding, the Commission did not receive legal argument on the status of WCCS vis a vis Ashcreek. Although the question of whether WCCS is a separate entity may be important in terms of Commission oversight, it is not critical to the matter before us, which is a Complaint brought by GCU. The evidence supports a finding that WCCS has been providing water utility service as a public service corporation under Article XV of the Arizona Constitution. At no time did WCCS request adjudication not a public service corporation, and thus, WCCS has been operating as a public service corporation. As a public service corporation, WCCS is subject to Commission regulation. WCCS is, or was, controlled by David Smith, or David Smith and William Clay Smith, both of whom participated in these proceedings. We direct Staff to investigate the claims that WFF users advanced funds to WCCS and to make a recommendation whether the Commission should take additional action against WCCS or David or William Clay Smith, as the operators of the uncertificated public service corporation. We expect too that Staff will work with the new management of Ashcreek to determine how the WFF assets should be reported.

* * * * *

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

FINDINGS OF FACT

1. GCU is certificated to provide water utility service to portions of Graham County near Pima, Arizona, including the area known as White Fence Farms.

2. Ashcreek is certificated to provide water utility service in an area of Graham County, adjacent to the WFF area.

3. GCU's and Ashcreek's certificated areas border each other along Melanie Street, which runs long the southern boundary of the WFF area.

4. On August 30, 2001, GCU filed a formal complaint with the Commission against Ashcreek alleging that Ashcreek had extended water lines and service into the White Fence Farms area without GCU's consent.

1 5. On December 12, 2001, the Hearing Division issued a Procedural Order that set a pre-
2 hearing conference for January 17, 2002, in Tucson, Arizona and ordered Ashcreek to file an Answer
3 to the Complaint no later than December 31, 2001.

4 6. David Smith, representing Ashcreek, prepared a letter dated January 2, 2002, which
5 appears to have been drafted in response to the December 12, 2001, Procedural Order.

6 7. At the January 17, 2002, pre-hearing conference GCU and Ashcreek agreed that they
7 might benefit from additional time to engage in settlement discussions.

8 8. By Procedural Order dated January 18, 2002, the Administrative Law Judge set the
9 matter for hearing on March 28, 2002 in Tucson, Arizona.

10 9. On March 25, 2002, Ashcreek notified the Commission that an indispensable party
11 had not been made a party to the proceeding. Ashcreek requested a continuance of the March 28,
12 2002 hearing date to give it time to file a third party complaint against William Clay Smith. GCU
13 agreed to the continuance.

14 10. By Procedural Order dated March 25, 2002, the Administrative Law Judge continued
15 the hearing indefinitely.

16 11. On July 22, 2002, because Ashcreek had not filed a Third Party Complaint and the
17 parties had not reached a settlement, the Administrative Law Judge issued a Procedural Order which
18 set a procedural conference for August 1, 2002.

19 12. On July 25, 2002, Ashcreek filed a Motion for Order to Join Indispensable Party and
20 Leave to File Third Party Complaint, as well as an Answer and Third Party Complaint. Ashcreek
21 asserted that the relief GCU seeks cannot and should not be rendered by the Commission without
22 asserting jurisdiction over William Clay Smith.

23 13. On August 1, 2002, a pre-hearing conference convened. GCU, Ashcreek and Staff
24 appeared through their respective counsel. Staff recommended that the parties participate in a Staff-
25 facilitated mediation to determine if a resolution could be reached without going to a formal hearing.
26 The parties agreed, but Ashcreek reiterated its concern that a complete resolution would not be
27 possible without the participation of William Clay Smith.

28 14. By Procedural Order issued August 8, 2002, the Administrative Law Judge granted

Ashcreek's Motion to Join an Indispensable Third Party, and ordered Ashcreek to effect personal service on William Clay Smith. The Procedural Order ordered the parties to contact Staff to arrange for mediation, and set another pre-hearing conference for October 10, 2002.

15. Pursuant to the August 8, 2002 Procedural Order, a pre-hearing conference convened on October 10, 2002. GCU was represented by counsel, but Ashcreek had relieved Mr. Kennedy of all responsibilities as counsel, and was represented by David Smith, a partner in the utility. William Clay Smith also appeared, as did Commission Staff, appearing through counsel. The parties had not arranged for mediation with Staff, nor had Ashcreek served William Clay Smith with the Third Party Complaint, although Mr. William Clay Smith appeared voluntarily.

16. By Procedural Order dated October 11, 2002, the matter was set for hearing on November 21, 2002, at the Commission's offices in Tucson, Arizona.

17. The hearing convened as scheduled on November 21, 2002, at the Commission's office in Tucson, Arizona. GCU appeared through counsel. David Smith represented Ashcreek, and William Clay Smith participated on his own behalf. Witnesses testifying included Steve Lines, GCU's General Manager; Jason Hughes, GCU's Operations Manager, Russ Barney GCU's Chief Financial Officer; David Smith one of the partners of Ashcreek and William Clay Smith. Staff did not participate.

18. West Central Community Service is an unincorporated entity under the control of either, or both, David Smith and William Clay Smith.

19. David Smith, a partner in Ashcreek, participated in the management of Ashcreek and permitted Ashcreek to provide water to WCCS by means of three 2 inch meters. David Smith knew WCCS would be providing water service to users in the WFF area.

20. Independent of his position as a partner of Ashcreek, David Smith financed the construction of facilities for WCCS to serve the WFF area.

21. The preponderance of evidence indicates that Ashcreek provides water service directly to several lots located along Melanie Street within the WFF area. The remaining lots in WFF that receive water appear to be served by WCCS.

22. There was no evidence that WCCS installed the facilities to serve the WFF area

1 according to applicable code requirements. WCCS has failed to repair leaks in the WFF area and has
2 often failed to collect from its users or to pay its water bill to Ashcreek.

3 23. Prior to November 22, 2004, there was no evidence of a borderline agreement, verbal
4 or written, between GCU and Ashcreek or GCU and WCCS that would permit Ashcreek or WCCS to
5 provide water utility service within the WFF area.

6 24. GCU's closest existing facilities to WFF are located approximately 5,000 feet from the
7 WFF area. GCU estimated the cost of installing facilities to serve WFF is approximately \$100,000,
8 and would be too much for GCU to absorb.

9 25. On August 13, 2003, the Commission issued Decision No. 66180 which appointed
10 Mr. Bevan Barney to act as interim manager of Ashcreek.

11 26. On August 11, 2004, Mr. Barney, as interim manager of Ashcreek, filed an
12 Emergency Motion seeking guidance with respect to serving customers in the White Fence Farms
13 area and indicating that Ashcreek and GCU were able to agree in principal to a Borderline Agreement
14 that would consensually resolve the issues contained in the Complaint.

15 27. By Procedural Order dated August 27, 2004, Staff was ordered to investigate the facts
16 surrounding the provision of service in the White Fence Farms area.

17 28. Pursuant to the August 27, 2004 Procedural Order, Staff filed a Staff Report on
18 September 27, 2004. Staff found that WCCS was providing service to 14 metered customers within
19 the WFF area without a CC&N, and that Ashcreek had no permission from the Commission to supply
20 water outside the boundaries of its CC&N. Staff agreed with the parties that a Borderline Agreement
21 that would allow Ashcreek to collect for water use directly from WFF customers and make repairs
22 within the WFF area would be the best solution to the problem.

23 29. A Procedural Conference on Ashcreek's Emergency Motion was held on September
24 30, 2004. Present at the September 30, 2004 Procedural Conference, either in person or
25 telephonically, were Mr. Bevan Barney, Mr. David Smith. Mr. William Clay Smith, Mr. Russ Barney
26 representing GCU, and Commission Utilities Division Staff appearing through counsel. During the
27 Procedural Conference Mr. Bevan Barney, as interim manager of Ashcreek, and GCU confirmed that
28 they had been able to reach agreement on a Borderline Agreement that would resolve the Complaint.

1 Staff and all parties present at the September 30, 2004 Procedural Conference agreed that the
2 proposed Borderline Agreement was the best resolution of the Complaint and would best serve the
3 needs of customers in the White Fence Farms area.

4 30. By Procedural Order dated October 19, 2004, the Administrative Law Judge ordered
5 Ashcreek and GCU to reduce to writing and file the Borderline Agreement for review and approval
6 by the Commission. The October 19, 2004, Procedural Order also ordered interested parties to file
7 comments and/or recommendations concerning the proposed Borderline Agreement within ten days
8 of its filing date.

9 31. Ashcreek and GCU filed their proposed Borderline Agreement on November 22,
10 2004. A copy of the proposed Borderline Agreement is attached hereto as Exhibit A, and
11 incorporated herein by reference.

12 32. As of January 6, 2005, neither Staff nor any party, had filed comments to the
13 Borderline Agreement pursuant to the October 19, 2004 Procedural Order. By Procedural Order
14 dated January 6, 2005, the time for parties to file comments to the Borderline Agreement was
15 extended until January 27, 2005. Staff was ordered to file its recommendations on whether the
16 November 22, 2004 Borderline Agreement, is in the public interest and whether in Staff's opinion
17 there are additional issues that need to be resolved.

18 33. On January 27, 2005, Ashcreek filed a pleading entitled "Additional Issues."
19 Ashcreek noted that customers in the White Fence Farms area have claimed to have paid
20 contributions for service ranging from \$300 to \$2,000, but that Ashcreek has no record as to the
21 amount or when such alleged contributions were made. Ashcreek sought guidance on how to value
22 the assets associated with the contributions and whether such contributions should be treated as
23 contributions or advances.

24 34. On January 27, 2005, Mr. David Smith filed comments entitled "Response of
25 Respondent." Mr. Smith did not object to the proposed Borderline Agreement.

26 35. On February 15, 2005, Staff filed its Staff Report on the proposed November 22, 2004
27 Borderline Agreement. On February 18, 2005, Staff filed an Amended Staff Report. Staff
28 recommended approval of the Borderline Agreement with certain revisions.

1 36. By Procedural Order dated February 23, 2005, a Procedural Conference for the
2 purpose of discussing and clarifying the various comments and recommendations convened on March
3 7, 2005.

4 37. The Borderline Agreement, as executed by Ashcreek and GCU, provides that for an
5 annual fee of \$10.00, Ashcreek will be permitted to provide water service to customers within the
6 WFF subdivision. The Agreement provides that Ashcreek will assume the infrastructure of WCCS
7 "with the consent of the Arizona Corporation Commission, Utilities Division" and use such
8 infrastructure to serve customers in the WFF area. If GCU eventually extends lines to serve WFF,
9 the installed infrastructure that meets current state standards will be sold to GCU at the depreciated
10 value, and Ashcreek will bill customers in the WFF area at Ashcreek's approved tariff rates. The
11 agreement provides for annual renewal unless canceled by either party.

12 38. The February 18, 2005 Staff Report indicates that Staff found the proposed Borderline
13 Agreement to be generally acceptable, but made several comments or recommendations. Staff
14 recommended: 1) eliminating language "with the consent of the Arizona Corporation Commission";
15 2) clarifying language that limits GCU's liability in the subject area; 3) requiring notification to the
16 WFF customers; and 4) affirming that Ashcreek will provide water that complies with all laws and
17 regulatory standards to WFF customers.

18 39. Staff's recommendations concerning the proposed Borderline agreement are
19 reasonable and the proposed agreement should be modified accordingly.

20 40. In addition, the Borderline Agreement should be approved only on the condition that
21 Ashcreek is required to continue to serve the WFF area until further order of the Commission.

22 CONCLUSIONS OF LAW

23 1. GCU and Ashcreek are public service corporations within the meaning of Article XV of
24 the Arizona Constitution and A.R.S. §§ 40-203, 40-246, 40-249, 40-281, 40-361, 40-421.

25 2. West Central Community Service is a public service corporation within the meaning of
26 Article XV of the Arizona Constitution.

27 3. West Central Community Service has not received a Certificate of Convenience and
28 Necessity from the Commission nor has it requested adjudication not a public service corporation.

4. The Commission has jurisdiction over GCU, Ashcreek, WCCS and the subject matter of the Complaint.

5. Notice of the Complaint was provided in accordance with law.

6. The White Fence Farms areas is located within the certificated area of GCU.

7. Neither Ashcreek nor WCCA has been authorized to provide water utility service within the WFF area.

8. There is a public need and necessity for water service in the White Fence Farms area.

9. The Borderline Agreement attached hereto as Exhibit A, as modified and conditioned herein, is a fair and reasonable resolution of the Complaint filed by GCU against Ashcreek.

10. Staff recommended modifications to the Borderline Agreement as described in the discussion section of this Order and summarized in Findings of Fact No. 38 are reasonable and should be adopted.

11. The Borderline Agreement as modified herein should be approved subject to the conditions that Ashcreek provide notice of the Agreement and its rates and charges to the White Fence Farms customers within 30 days of the effective date of this Order; that Ashcreek provide water that meets the quality standards of ADEQ and is in compliance with all Commission rules and regulations; and that Ashcreek continue to serve the WFF area until further order of the Commission.

ORDER

IT IS THEREFORE ORDERED the Borderline Agreement attached hereto as Exhibit A is approved with the modifications discussed herein and conditioned as provided hereinbelow.

IT IS FURTHER ORDERED that Ashcreek Water Company shall provide notice of the approved Borderline Agreement and its approved rates and charges to the customers in the White Fence Farms area in a form to be approved by Staff within 30 days of the effective date of this Decision.

IT IS FURTHER ORDERED that approval of the Borderline Agreement is conditioned upon Ashcreek Water Company providing water to the White Fence Farms area that meets quality standards of the Arizona Department of Environmental Quality and service that is in conformance with all Commission rules and regulations.

IT IS FURTHER ORDERED that West Central Community Services shall cease and desist from providing water utility service.

IT IS FURTHER ORDERED that Commission Staff shall investigate the claims that White Fence Farms users advanced funds to West Central Community Services, and shall make appropriate recommendations whether the Commission should take additional action against West Central Community Services or David Smith or William Clay Smith.

IT IS FURTHER ORDERED that Ashcreek Water Company shall continue to serve the White Fence Farms area under its approved rates and charges until further order of the Commission.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 21st day of June, 2005.

BRIAN C. McNEIL
EXECUTIVE SECRETARY

DISSENT _____

DISSENT _____

JR:mj

1 SERVICE LIST FOR:

GRAHAM COUNTY UTILITIES, INC. v.
ASHCREEK WATER COMPNAY

2 DOCKET NO.:

W-02494A-01-0671

3 Bevan Barney, Interim Manager
4 Ash Creek Water Co.
5 c/o Loma Linda Water Company
6 P.O. Box 967
7 Thatcher, AZ 85552

8 David Smith
9 1316 E. Kenwood Circle
10 Mesa, Arizona 85203

11 Steve Lines, General Manager
12 Graham County Utilities, Inc.
13 PO Drawer B
14 Pima, Arizona 85543

15 William Clay Smith
16 Po Box 1194
17 Fredonia, AZ 86022-1194

18 Mr. Christopher Kempley, Chief Counsel
19 Legal Division
20 ARIZONA CORPORATION COMMISSION
21 1200 West Washington Street
22 Phoenix, Arizona 85007

23 Mr. Ernest Johnson, Director
24 Utilities Division
25 ARIZONA CORPORATION COMMISSION
26 1200 West Washington Street
27 Phoenix, Arizona 85007
28

EXHIBIT A

Borderline Agreement

between

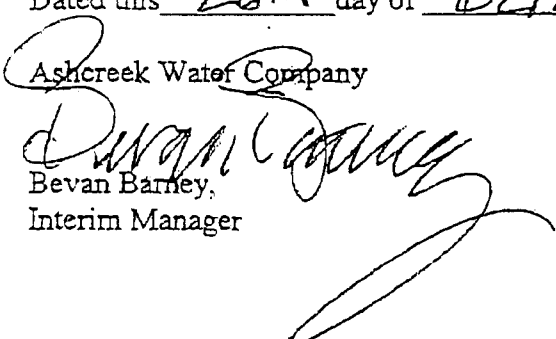
Graham County Utilities, Inc. and Ashcreek Water Company

Whereas: Ashcreek Water Company can serve customers within the White Fence Farms, a recorded plat in Graham County Arizona, which is in the CC&N of Graham County, Arizona. This agreement is made to allow Ashcreek Water Co. to serve this area and to protect the interest of Graham County Utilities in their CC&N which includes the White Fence Farms Subdivision.

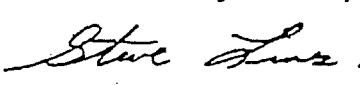
1. This Agreement renews annually unless canceled by either party, with the payment of an annual fee of \$10.00 to Graham County Utilities.
2. Ashcreek Water Company will assume the infrastructure of the West Central Water Companies with the consent of the Arizona Corporation Commission, Utilities Division, and use said infrastructure to serve customers within White Fence Farms. Ashcreek Water Company will maintain the infrastructure at no cost to Graham County Utilities, Inc. Future lines and meters installed will be at the expense of Ashcreek Water Company. Graham County Utilities will incur no liability in the area and Ashcreek Water Company shall hold harmless from all claims, including Court costs and attorney fees, Graham County Utilities, Inc. from the operation of Ashcreek Water Co.
3. If Graham County Utilities, Inc. extends lines to serve those customers in White Fence Farms, the installed infrastructure that meets current standards for water delivery will be sold to Graham County Utilities, Inc. at the depreciated value, and there will be no other charge or value placed on the transaction.
4. Ashcreek Water Company will use their tariff to bill the customers within the White Fence Farms recorded plat.

Dated this 26th day of OCTOBER, 2004

Ashcreek Water Company


Bevan Barney,
Interim Manager

Graham County Utilities, Inc.


Steve Lines
General Manager.

